WONG CHEE KONG

v.

TIMBALAN MENTERI HAL EHWAL DALAM NEGERI MALAYSIA & ANOR & OTHER APPLICATIONS

HIGH COURT MALAYA, KANGAR
VINCENT NG J
[CRIMINAL APPLICATIONS NO: 44-01-99, 44-02-99, 44-03-99, 44-04-99, 44-06-99, 44-07-99 & 44-08-99]
8 DECEMBER 1999
[2000] CLJ JT(1)

PREVENTIVE DETENTION: *Detention - Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Application for habeas corpus - Applicant released from detention centre but immediately re-arrested and detained - Fresh detention - Whether without grounds and allegations of facts - Whether tainted with mala fide - Whether arresting officer acted in spurious and mechanical fashion - Whether there was malice in law - Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(1), 4(1), 7B(1) & (2)*

PREVENTIVE DETENTION: *Detention order - Revocation of - Effect - Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Whether revocation of a detention order also revoked the grounds and allegations of fact therefor - Minister issuing fresh detention order based on grounds and allegations of fact of a revoked detention order - Whether fresh detention order unlawful - Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(1), 4(1), 7B(1) & (2) - Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6A(2), 11B*

STATUTORY INTERPRETATION: *Aids to construction - Cognate statutes - Principles of interpretation - Use of in pari materia statute as an aid to construction - Emergency (Public Order and Prevention of Crime) Ordinance 1969 s. 7B(1) & (2) - Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6A(2), 11B*

The applicant was detained under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') *vide* a detention order dated 27 December 1997 ('the Initial Detention Order'). The applicant applied for a writ of *habeas corpus* challenging his detention, but, before the hearing thereof, the Minister revoked the Initial Detention Order under s. 7B(1) of the Ordinance and released the applicant. Immediately upon

his release, however, the applicant was re-arrested, and thereafter, after the usual 60 days detention, and upon the grounds and allegations of fact as that of the Initial Detention Order, the Minister again invoked s. 4(1) of the Ordinance and issued a fresh detention order against the applicant.

The applicant alleged that the fresh detention order was unlawful, arguing that revocation of the Initial Detention Order had also annulled and rescinded the grounds and allegations of fact on which the revoked order was based, and that being so, his re-arrest was *mala fide* as the arresting officer and the designated officer had no grounds to detain him, or were not in the position to believe that there were grounds for his detention then under s. 4(1) of the Ordinance. The applicant, in the circumstances, applied for a fresh writ of *habeas corpus* for his release. The respondents' main defence was that the fresh detention was valid, as revocation of the Initial Detention Order only affected the detention order *per se*, and not the allegations of fact or grounds on which the order was based.

Held:

[1] The power under the Ordinance has not been exercised by the Minister in accordance with nor within the scope of the Ordinance.

[2] To resolve the contentious issues herein, it is pertinent to look into other preventive laws, in particular s. 11B of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'), as this section is *in pari materia* with s. 7B of the Ordinance. It is also necessary to look into the new s. 6A(2) of the Act, as that section, unlike the Ordinance, expressly empowers the Minister to make a fresh detention order upon previous or old grounds and statements of fact. These considerations apart, it is trite that, quite unlike other cases, in *habeas corpus* cases involving incarceration without trial, the crucial question to determine is not what, by implication or inference, Parliament had in mind, but what Parliament had expressed in clear and unequivocal language.

[3] In the present case, notwithstanding that the Ordinance and the Act are cognate legislations in that both are designed for the purpose of incarceration of a subject without trial, and s. 7B of the Ordinance and s. 11B of the Act are *in pari materia*, it would militate against the canons of statutory construction to read the new s. 6A(2) of the Act into the Ordinance, as the Act and the Ordinance are clearly of differing scopes, dissimilar in purpose and in reference to different subject.

[3a] In the light of the applicable principles of statutory interpretation, it is certainly warranted to bring into play and juxtapose s. 6A(2) of the Act with s. 7B(2) of the Ordinance, and thereby to hold that, in the current case, if it was Parliament's intention to allow a new detention order based on old grounds and allegations of fact, it would have made amendments similar to s. 6A(2) of the Act. In any case, bearing in mind the vital principle enunciated by the Supreme Court in *Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri, Malaysia*, it is altogether crucially necessary, in cases of detention without trial, that the relevant provision in the Ordinance should expressly use the expressions used in the said s. 6A(2).

[4] Without the fresh grounds and allegations of fact, the fresh detention order is unsustainable, precisely due to the statutory stipulation that the Minister must be "satisfied". Clearly, the principle established in *Poh Chin Kay* and a host of kindred authorities could not be hurdled by the respondents. On this ground alone, the writ ought to be allowed.

[5] The manner and the procedure employed by the detaining authorities in their implementation of the fresh detention order had displayed malice in law though not malice in fact. Malice in law denotes absence of legal excuse.

[5a] It is obvious that due to the very brief time period between the release and re-arrest of the detenue at the entrance gate of the detention centre, the arresting officer was clearly not at all in the position to believe that the detenue had acted in a manner which would justify his detention. This court fails to see what the detenue could have done on his way out to the entrance gate of the detention centre, which could constitute "acting in any manner prejudicial to public order", thus necessitating his detention. The arresting officer had thus acted in a spurious and mechanical fashion, with absolutely no application of mind, in his report to the Minister. Therefore, there was malice in law here, as there were spurious, synthetic and robotic procedures employed in the issuance of the subsequent detention order which constituted a colourable exercise of and fraud on power, proscribed by the Ordinance. Also, bearing in mind the period of detention that the applicant had already served, he was indeed truly penalised, when the two year period was made to commence from the date of the fresh detention order.

[Writ petition allowed; petitioner released forthwith.]

Case(s) referred to:

AG v. HRH Prince Ernest Augustus of Hanover [1975] 1 All ER 49 ***(refd)***

Allgemeine Gold-Und Silberscheideanstalt v. Customs 7 Excise Commissioner [1980] 2 All ER 138 ***(refd)***

Amalgamated Television Services Pty Ltd v. Australian Broadcasting Tribunal [1984] 1 FCR 409 ***(refd)***

Andrew Thamboosamy v. Superintendent [1976] 2 MLJ 156 ***(refd)***

B Hembram & Ors v. State of West Bengal AIR [1974] SC 2279 ***(refd)***

Baulkham Hills Shire Council v. O'Donnell [1987] 62 LGRA 7 ***(refd)***

Benin v. Whimster [1976] QB 297 ***(refd)***

Bhupinder Singh v. State of Haryana AIR [1968] Punj 406 ***(refd)***

Castlemaine City Council v. Scott (No 2) [1973] VR 277 ***(refd)***

Cham Yoon Liang v. Menteri Dalam Negeri Malaysia & Anor [1989] 2 CLJ 993 ***(refd)***

Chng Suan Tse v. Minister of Home Affairs & Ors [1989] 1 MLJ 69 ***(refd)***

Chotka Hembram v. State of WB [1974] 3 SCC 401 ***(refd)***

Chua Lee Huat v. Menteri Dalam Negeri [1997] 2 CLJ Supp 18 ***(refd)***

Collins & Sons v. Bankstown Municipal Council [1958] 3 LGRA 216 ***(refd)***

Commissioner for Railways (NSW) v. Wynyard Holdings Ltd [1971] 2 NSWLR 70 ***(refd)***

Crowe v. Lloyds British Testing Co Ltd [1960] 1 QB 592 ***(refd)***

Daly v. Sydney Stock Exchange Ltd [1981] 2 NSWLR 179 ***(refd)***

Dunsmore v. Tiley [1978] 18 SASR 259 ***(refd)***

Ex parte Johannes Choeldi & Ors [1960] 26 MLJ 184 ***(refd)***

Gaylord Restaurant v. M Chambarai AIR Mad 108 ***(refd)***

Gibson v. Manukau City Council [1969] NZLR 474 ***(refd)***

Goh Ah Ba v. Timbalan Menteri Dalam Negeri Malaysia & Anor [1991] 2 CLJ 877 ***(refd)***

H Das v. District Magistrate Cuttack & Anor AIR [1969] SC 43 ***(refd)***

Haribandhu Das v. District Magistrate [1969] 1 SCR 227 ***(refd)***

Huakina Development Trust v. Waikato Valley Authority & Bowater [1986] 12 NZTPA 129 ***(refd)***

Icchu Devi v. Union of India AIR [1980] SC 1983 ***(refd)***

JK Steel Ltd v. Union of India AIR [1970] SC 1173 ***(refd)***

Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia [1969] 2 MLJ 129 ***(refd)***

Lai Ah Fatt v. Timbalan Menteri Dalam Negeri Malaysia [1990] 2 MLJ 312 ***(refd)***

Lake v. Bennett [1970] 1 QB 663 ***(refd)***

Lee Gee Lam v. Timbalan Menteri Dalam Negeri Malaysia [1993] 4 CLJ 155 ***(refd)***

Lee Guan Seng v. Timbalan Menteri Dalam Negeri & Anor [1992] 3 CLJ 1440 ***(refd)***

Lee Mau Seng v. Minister of Home Affairs, Singapore & Anor [1971] 2 MLJ 137 ***(refd)***

Lee-Verhulst (Investments) Ltd v. Harwood Trust [1973] 1 QB 204 ***(refd)***

Lee Weng Kin v. Menteri Hal Ehwal Dalam Negeri Malaysia [1991] 2 CLJ 1301 ***(refd)***
Liew Kim Swee v. Menteri Dalam Negeri Malaysia & Anor [1991] 1 CLJ 53 ***(refd)***
Marquis Camden v. Inland Revenue Commissioner [1914] 1 KB 641 ***(refd)***
Menteri Hal Ehwal Dalam Negeri Malaysia v. Lee Gee Lam [1993] 4 CLJ 336 ***(refd)***
Minister of Home Affairs, Malaysia & Anor v. Karpal Singh [1983] 3 MLJ 29 ***(refd)***
Ministry of Housing & Local Government v. Sharp [1970] 2 QB 223 ***(refd)***
Mobitel International Pty Ltd v. Dun & Bradstreet (Aust) Pty Ltd [1977] 17 SASR 140 ***(refd)***
Mok Han Lian v. Timbalan Perdana Menteri Dalam Negeri Malaysia & Ors [1996] 3 CLJ 122 ***(refd)***
Morgan Perumal v. K/I Hussein Abdul Majid & Ors [1998] 3 CLJ 629 ***(refd)***
NC Jute Mills v. Finance Ministry [1965] AIR 1966 Cal 151 ***(refd)***
New Central Jute Mills v. Union of India 73 Cal WN 557 ***(refd)***
Northern Ireland Trailers Ltd v. Preston Corpn [1972] 1 WLR 203 ***(refd)***
Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1990] 2 MLJ 297 ***(foll)***
PP v. Koh Yoke Koon [1988] 2 CLJ 182 ***(refd)***
Pradip Kumar Dass & Ors v. State and Benggol & Ors [1975] SC vol 3 ***(foll)***
R v. Buttle [1870] LR 1 CCR 248 ***(refd)***
R v. Caldwell & Kinross ex p Makin [1986] 2 Qd R 397 ***(refd)***
R v. Industrial Appeals Court and The Fire Fighters Board [1959] VR 345 ***(refd)***
R v. Lewes Crown Court, ex p Rogers [1974] 1 WLR 196 ***(refd)***
R v. Loxdale [1758] 97 ER 394 ***(refd)***
R v. Wheatley [1979] 1 WLR 144 ***(refd)***
R v. Wheeldon (No 1) [1978] 33 FLR 402 ***(refd)***
Ramesh Chandra v. Jagannath AIR [1975] Orissa 121 ***(refd)***
Re John Sanderson & Co (NSW) Pty Ltd (in liquidation) (No 2) [1976] VR 225 ***(refd)***
Riordan v. Connor [1981] 53 FLR 112 ***(refd)***
Riordan v. Parole Board of the ACT [1981] 34 ALR 322 ***(refd)***
Sadhu Singh v. The Delhi Administration AIR [1966] SC 91 ***(refd)***
Sambhu Nath Sarkar v. State of WB [1973] 1 SCC 856 ***(refd)***
Shah & Co Bombay v. State of Maharashtra AIR [1967] SC 1877 ***(refd)***
Shearer v. Shields [1914] AC 808 ***(refd)***
State of Punjab v. Okara Grain Buyers Syndicate Ltd, Okara AIR [1964] SC 669 ***(refd)***
Tan Hoon Seng & Ng King Chew v. Minister for Home Affairs & Anor [1990] 1 CLJ 423 ***(refd)***
Tan Yap Seng v. Ketua Polis Negara & Ors [1991] 2 CLJ 1400 ***(refd)***
Teo Soh Lung v. Minister for Home Affairs & Ors [1992] 2 CLJ 943 ***(refd)***
The Public Trustee v. The A-G [1973] Tas SR 97 ***(refd)***
The Sirsilk Ltd v. The Textiles Committee AIR [1989] SC 317 ***(refd)***
United Society v. Eagle Bank [1829] 7 Connecticut 457 ***(refd)***

Venkataraman v. Union of India [1979] 2 SCC 491 ***(refd)***
Vincent Cheng v. Minister for Home Affairs & Ors [1990] 1 CLJ 863 ***(refd)***

Legislation referred to:
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3, 5, 6(1)(a), (b), 6A(2), 11(1), 11B(1), (2)
Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(1), (3)(c), 3B(1), 4(1), 5, 7B(1), (2), 7B(2), 7C(1)

Maintenance of Internal Security Act 1971 [India], ss. 3, 14

Other source(s) referred to:
Craies Statute Law, 7th edn, p 134
KJ Aiyar's Judicial Dictionary, 1992 edn, pp 727, 728
Law of Writs, AS Chandhury & RG Chahurpedia, 1985 edn
Oxford Dictionary, 9th edn
Principles of Statutory Interpretation, Guru Prasanna Singh, 1996, 6th edn
Statutory Interpretation, Donald Gifford, 1990 edn

For the applicants - V Shanmugam; M/s Shanmugam & Co
For the respondents - Mohamad Abazafree Mohd Abbas FC

Reported by WA Sharif

JUDGMENT

Vincent Ng J:

There are before me seven applications for writs of *habeas corpus* based upon identical grounds, with both sides proposing and agreeing that the above application No. 44-01-99 be the anchor case (anchor case), the decision in which, the fate of the other six applications shall rest.

In the anchor case, the applicant (the applicant) was initially detained *vide* a detention order dated 27 December 1997 (the Initial Detention Order) under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (thereinafter referred to as, the Ordinance). In the wake of and indeed fortified by the decision of the Court of Appeal in *Morgan a/l Perumal* [1998] 3 CLJ 629; [1998] 3 MLJ and my decision in *Chua Lee Huat v. Menteri Dalam Negeri* [1997] 2 CLJ Supp 18; [1997] 2 MLJ 395 the applicant applied for a writ of *habeas corpus* in the High Court challenging the Initial Detention Order. However, on or before the hearing of that application, the Minister revoked the Initial Detention Order under s. 3B(1) of the Ordinance, released the applicant, and promptly re-arrested him at the main gate of Simpang Renggam prison under s. 3(1) of the Ordinance. And, after the usual 60 days detention under the said provision, a fresh detention order was issued on 9 January 1999 by the Minister under

s. 4(1) of the same Ordinance. The facts and features common to all the other applications could be easily gleaned from the brief summary of their relevant data below:

(1) Application No. 44-01-1999 By Wong Chee Kong

Initial Detention Order dated 27 December 1997.

Based on allegations of fact that allegedly occurred between 1995 to 1996 ("allegedly" as nothing need to be proved to incarcerate a detenue – only "allegations of fact").

Fresh Detention Order dated 9 January 1999 for period of two years from date thereof.

Revoked on 11 November 1998.

(2) Application No: 44-02-1999 By Wong Chee Peng

Initial Detention Order dated 20 March 1998.

Based on allegations of fact that allegedly occurred in 1995.

Revoked on 12 October 1998.

Fresh Detention Order dated 9 December 1998 for two years with effect from 10 December 1998.

(3) Application No. 44-03-1999 By Chia Yun Huat

Initial Detention Order dated 20 March 1998.

Based on allegations of fact that allegedly occurred in 1995.

Revoked on 12 October 1998.

Fresh Detention Order dated 9 December 1998 for two years with effect from 10/12/98.

(4) Application No. 44-04-1999 By Kartygeson a/l Veloo

Initial Detention Order dated 21 May 1996.

Based on allegations of fact that allegedly occurred between 1992 to 1995.

Revoked on 12 October 1998.

Fresh Order dated 9 December 1998 for two years with effect from 10 December 1998.

(5) Application No: 44-06-1999 By Lau Kim Long

Initial Detention Order dated 25 April 1998.

Based on allegations of fact that allegedly occurred in 1997.

Revoked on 29 July 1998.

Fresh Order dated 24 September 1998 for two years with effect from 26 September 1998.

(6) Application No. 44-07-1999 By Cheow Kok Keng

Initial Detention Order dated 17 January 1996.

Based on allegations of fact that allegedly occurred between 1992 to 1994.

Revoked on 29 July 1998.

Fresh Order dated 24 September 1998 for two years with effect from 26 September 1998.

(7) Application No: 44-08-1999 By Manimaran a/l Govindasamy

Initial Detention Order dated 21 May 1998.

Based on allegations of fact that allegedly occurred between 1996 to 1997.

Writ *Habeas Corpus* Allowed on 02 March 1999.

Fresh Order dated 15 May 1999 for two years with effect from 15 May 1999.

The parties are agreed that for this court's determination are only two novel issues common to all the applications, which could be stated shortly as:

(a) Whether it is permissible under the law for the Minister to issue a fresh detention order against the applicant under s. 4(1) of the Ordinance after having revoked (the same word used by the Federal Counsel, for the respondents) the Initial Detention Order under s. 7B(1) of the Ordinance, on the same grounds and allegations of fact as that which founded the Initial Detention Order, that is say, a fresh detention order based on the old grounds and allegations of fact.

(b) The re-arrest of the applicant under s. 3(1) of the Ordinance was a *'mala fide'* act in the sense that the arresting officer and the designated officer had acted *mala fide* as he had no grounds to detain, and indeed, was not in the position to believe that there were grounds which would justify the applicant's detention under s. 4(1).

Before I begin, it would be useful to remind myself that, to evolve a decision, valid both in law and logic, my deliberation would have to revolve within certain legal boundaries established by statute and high case authorities, which are here set out.

(1) Our courts are obliged to abide by the express legislative caveat in s. 7C(1) of the Ordinance which states that:

"There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Ordinance, save in regard to any question on compliance with any procedural requirement in this Ordinance governing such act or decision." It is clear from this ouster provision that the subjective satisfaction of the Minister in his decision to issue a detention order is non-justiciable, though the court may examine the grounds disclosed by "the detaining authority by honest affidavit" to see whether the detention is relevant to the object which the legislation provides. (*Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, 136, *Sadhu Singh v. The Delhi Administration* AIR [1966] SC 91 Akta, and *Minister of Home Affairs, Malaysia & Anor v. Karpal Singh* [1983] 3 MLJ 29. *Timbalan Menteri Hal Ehwal Dalam Negeri v. Lee Gee Lam & Anor* [1993] 3 MLJ 673. It is therefore not open to the court to entertain the protestations of the detenue that he is innocent of the allegations made against him and that he is not a person who has acted or would act in any manner prejudicial to public order or resort to violence. It is precisely for this reason that the court have in the past consistently held that the question of *mala fide* or malice in fact, real or conjectured, is non-justiciable see *Lee Mau Seng v. Minister of Home Affairs, Singapore & Anor* [1971] 2 MLJ 137; *Chng Suan Tse v. Minister of Home Affairs 7 Ors* [1989] 1 MLJ 69; *Teo Soh Lung v. Minister for Home Affairs & Ors* [1989] 2 MLJ 449 (iv) *Vincent Cheng v. Minister for Home Affairs & Ors* [1991] 1 MLJ 449; and my decision in *Lee Gee Lam v. Timbalan Menteri Dalam Negeri, Malaysia* [1993] 3 MLJ 265. In this regard, it may be appropriate to repeat what I had occasion to say in *Lee Gee Lam v. Timbalan Menteri Dalam*

Negeri, Malaysia (supra): "When a provision legislated by Parliament is crystal clear it leaves no room for variation by the courts under the guise of interpretation of law; though, conversely, needless to say, the courts would be abdicating its duties if it declines, in appropriate cases, to interpret equivocal or nebulous provisions of the law, if only to lend sensible or practical and empirical meaning to such provisions. The responsibility for clear and lucid crafting of language in a legislation, thus lies surely and squarely on the shoulders of the legal draftsman."

(2) The words "save in regard to any question on compliance with any procedural requirement in this Ordinance governing such act or decision" is clearly meant, and has been consistently interpreted by courts, to constitute a mandatory provision and safeguard to ensure strict compliance with any procedural requirement in the Ordinance governing the act or decision by the Minister. It is for this reason that in matters which concern personal liberty the applicant is entitled to avail himself of any technical defect which may invalidate the order which deprive him of that liberty. (See *Ex parte Johannes Choeldi & Ors* [1960] 26 MLJ 184). *Tan Yap Sen* [1991] 2 CLJ 1400; *Lee Guan Seng v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1992] 3 CLJ 1440; [1992] 2 MLJ 878; *Chua Lee Huat* [1997] 2 MLJ 395; *Morgan a/l Perumal* [1998] 3 MLJ 335; and *Mok Han Lian v. Timbalan Perdana Menteri Dalam Negeri Malaysia & Ors* [1996] 3 CLJ 122; [1996] 1 AMR 1247.

(3) It has been held by our courts that the power to detain a person without trial cannot be exercised by inference but must be expressed. See *Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1990] 2 MLJ 297; *Ex parte Johannes Choeldi & Ors* [1960] 26 MLJ 184; *Menteri Hal Ehwal Dalam Negeri, Malaysia v. Lee Gee Lam* [1993] 3 MLJ 673; *Tan Hoon Seng v. Minister for Home Affairs & Anor* [1990] 1 CLJ 423; *Icchu Devi v. Union of India*, AIR [1980] SC 1983; and *Lee Weng Kin v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1991] 2 CLJ 1301;

(4) The law of preventive detention must be construed strictly and in the case of doubt the court should lean in favour of the subject. See *Tan Hoon Seng and Ng King Chew v. Minister for Home Affairs & Anor* [1990] 1 CLJ 423; *R v. Buttle* [1870] LR 1 CCR 248 p. 252; *Andrew s/o Thamboosamy v. Superintendent* [1976] 2 MLJ 156; *Public Prosecutor v. Koh Yoke Koon* [1988] 2 MLJ 301/[1988] 2 CLJ 182.

(5) A detention order passed mechanically without proper application of mind could be impugned and struck down (See *Lee Gee Lam* [1993] 3 MLJ 673).

On Issue (a)

Quite rightly, the learned Federal Counsel, Encik Mohamad Abazafree Mohd. Abas, conceded that the Initial Detention Order was revoked and that both the words 'revoked' and 'cancelled' could be used interchangeably by virtue by the decision in the Indian case *Pradip Kumar Dass and Others v. State and Benggol & Others* (1975) Supreme Court cases Vol. 3, 335. According to the *Concise Oxford Dictionary* (9th edn) the word 'cancel' means: withdraw or revoke, obliterate or delete, annul, make void or abolish, and the word 'revoke' means rescind, withdraw, or cancel. The expression 'revocation' has been held by the Indian Court in *Haribandhu Das v. District Magistrate* [1969] 1 SCR 227, AIR [1969] SC 43 to include not only revocation of an order which is otherwise valid and operative but also orders which are invalid, and 'revocation' means cancellation of the previous orders. In *Pradip Kumar Das (supra)* it was held to mean: annulling, rescinding, withdrawing. In the facts and circumstances of that case, orders of release cancelling orders of detention amount to revocation of orders of detention. Closer home, Edgar Joseph Jr. J (as he then was) took the correct approach when, in *Lai Ah Fatt v. Timbalan Menteri Dalam Negeri, Malaysia* [1990] 2 MLJ 312, he gave a short answer to this question by stating that the word "revocation includes cancellation of all orders valid as well as invalid and cited two Indian cases – *H Das v. District Magistrate Cuttack & Anor* AIR [1969] SC 43 and *B Hembram & Ors v. State of West Bengal* AIR [1974] SC 2279."

The issue crucial for decision in this court is: whether revocation of the Initial Detention Order would also have the concomitant effect of annulling, rescinding and withdrawing the grounds and allegations of fact on which the revoked order was based. The main thrust of the respondents' case is that the revocation of Initial Detention Order only has the effect of revoking the Initial Detention Order itself, leaving the grounds and allegations of fact intact to found a fresh detention order. However, both in *Pradip Kumar Das (supra)* and *Sambhu Nath Sarkar v. State of W.B.* [1973] 1 SCC 856: [1973] SCC (Cri) 618 it was held that revocation of an earlier detention order had the essential effect of also revoking the allegations of fact and grounds which founded the earlier order of detention. And, consequently the state was not competent to pass the subsequent order of detention on the same facts and grounds as in the earlier order of detention. Further, in another Indian case of *Chotka*

Hembram v. State of W.B. ([1974] 3 SCC 401: [1973] SCC (Cri) 966: AIR [1974] SC 432: [1974] 1 SCR 563: [1974] Cri LJ 449.) it was also held that, if an order for the detention of a person had been made under the Act and that order was either subsequently revoked or the period for which the detention order was made had expired, the said order would not stand in the way of the making of a fresh order of detention against the same person, provided fresh facts have arisen after the date of the said revocation or expiry. And, if no fresh facts come into being after the date of revocation or expiry as may warrant the making of an order of detention, the requisite condition precedent to the making of the subsequent order would be non-existent and it would not be permissible to make a subsequent order of detention. After having carefully studied and mulled over this issue I am impelled to adopt the views of the Indian Courts in *Pradip Kumar Das (supra)* and *Sambhu Nath Sarkar (supra)*, as it is entirely logical to hold that revocation or annulling of a previous detention order would essentially also have the consequential effect of revoking or annulling or rescinding the allegations of fact upon which the previous order was based. I am fortified in taking this approach as this view seems to be implicit in the step taken by the Legislature, eg, in the context of the Dangerous Drugs (Special Preventive Measures) Act 1985, to introduce a new s. 6A(2) (inserted by Act A766/1990) to amend s. 11B of the same Act by expressly providing that the Minister may make a fresh detention order, "on the same ground as the previous detention or restriction order" after having revoked "a previous detention order" – for otherwise s. 6A(2) would be wholly unnecessary, superfluous and otiose, and Parliament does not idle itself legislating otiose trash, nor does it legislate in vain.

Pradip Kumar Das (supra) was a decision pertaining to ss. 3 and 14 of Maintenance of Internal Security Act 1971 ('MISA' of India), and Encik Abazafree made a valiant but futile attempt to distinguish s. 7B of our Ordinance from s. 14 of the Indian Act which is expressed in the following language:

> (1) Without prejudice to the provision of s. 21 of the General Clauses Act 1897 (10 of 1897), detention order may, at any time, be revoked or modified:
>
> (a) not withstanding that the order has been made by an officer mentioned in sub-section (2) of section 3, by the State Government to which that officer is subordinate or by the Central Government;
>
> (b) notwithstanding that the order has been made by the State Government or by the Central Government.

(2) The expiry or revocation of a detention order (hereafter in this sub-section referred to as the earlier detention order) shall not bar the making of another detention order (hereafter in this sub-section referred to as the subsequent detention order) under section 3 against the same person: Provided that in a case where no facts have arisen after the expiry or revocation of the earlier detention order made against such person, the maximum period for which such person may be detained in pursuance or the subsequent detention order shall, in no case, extend beyond the expiry of a period of twelve months from the date of detention under the earlier detention order or the expiry of the Defence and Internal Security of India Act 1971 (42 of 1971), whichever is later.

Mr Abazafree submitted that the words "Provided that in a case where no fresh fact have arisen after the expiry or revocation of earlier detention order made against such person, the maximum period ... extend beyond the expiry of the period of twelve months from ... date of ... earlier detention order" are not found in s. 7B of the Ordinance which implies that the authorities may make a fresh detention order only when fresh fact have arisen, and because of this the court in India was driven to hold that the revocation of an earlier detention order automatically also revokes the allegations of fact and grounds on which the earlier detention order was based. Thus, the main trust of his submissions is that a revocation of the Initial Detention Order is only confined to the detention order itself but does not in any way revoke the allegations of fact or grounds on which the Initial Detention Order was based. I couldn't disagree more with Federal Counsel on this score as the relevant words in the Indian provision mentioned by him merely denotes the intention of the Indian Legislature to limit the maximum period for which such person may be detained in pursuance of a subsequent detention order, which "shall, in no case extend beyond the expiry of a period of 12 months from the date of detention under the earlier detention order". Surely, it would be difficult to conceive of our legislature considering it appropriate to have a similar provision whereby the effective date of a subsequent detention order is back dated to the date of the initial detention order. In which case, it may perhaps be argued that the detenue would not be prejudiced by the fresh detention order period-wise. In any event, even should the old grounds and allegations of fact be unaffected by the revocation of the Initial Detention Order, yet such grounds and allegations are too remote in point of time to justify the making of the fresh detention order. See *Morgan a/l Perumal v. K/I Hussein bin Abdul Majid & Ors* [1998] 3 CLJ 629; [1998] 3 MLJ 335.

The focal point of all the current applications before me is s. 7B(1) of the Ordinance which reads:

> 7B. (1) Notwithstanding anything contained in this Ordinance, the Minister may at any time revoke any detention order made under section 4(1), or any restriction order made under section 4A(1), or any suspended detention order, or any direction under section 7A(1) or (2) for the extension of the duration of any such order, if he deems it just or fit to do so.
>
> (2) Any revocation under subsection (1) shall be without prejudice to the validity of the order or direction prior to its revocation or to anything done thereunder, or to the power of the Minister to make a fresh order or give a fresh direction under the provisions mentioned in subsection (1) in respect of the person against whom the order or direction which is revoked was made or given.

To gain insight and resolve this contentious issue, it is pertinent to look into other preventive laws, in particular, s. 11B of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act), as this section is in *pari materia* with s. 7B of the Ordinance. Section 11B provides: "Notwithstanding anything contained in this Act, the Minister may at any time revoke any detention order made under sub-s. (1) of s. 6, or any restriction order made under sub-s. (3) of s. 6, or suspend detention order, or any direction under sub-s. (1) of s. 11B, for the extension of the duration of any such order, if he deems it just or fit to do so. Any revocation under sub-s. (1) shall be without prejudice to the validity of the order or direction before its revocation or to anything done thereunder, or to the power of the Minister to make a fresh detention order under sub-s. (1) of s. 6 or a fresh restriction order under sub-s. (3) of s. 6 or a fresh direction under sub-s. (1) of s. 11A in respect of the person against whom the order or direction which is revoked was made or given".

Notably, s. 7B of the Ordinance and s. 11B of the Act were introduced at the same time. However, it is of material significance that subsequently Act A766 of 1990 further incorporated a new s. 6A(2) of the Act, as an essential provision, which for convenience, are reproduced below.

> (2) **No fresh detention order** or fresh restriction order referred to in subsection (2) of section 11B **shall be invalid or inoperative by reason** that no fresh report has been submitted under subsection (3) of section 3 and subsection (4) of section 5 or **that detention order** or restriction order **was made on the same ground as the previous detention** or restriction order. (emphasis added)

Thus, clearly, s. 6A(2) of the Act expressly provides the Minister with power to make or issue fresh detention order on the same ground as the previous detention order. It may be of interest to know that the new section was introduced as a result of nine matters then pending in Supreme Court (see *Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1990] 2 MLJ 297). On the other hand there is no such amendment in the Ordinance similar to s. 6A(2) which empowers the Minister to make a fresh detention Order based on previous or old grounds and statements of fact.

It cannot be denied that s. 6A(2) of the Act only applies whenever the Minister chooses to revoke an earlier detention order and replace it with a fresh detention order based on old grounds and allegations of fact. And, it is also crystal clear that, as there is no such new provision or amendment in the Ordinance similar to s. 6A(2), the Minister is not expressly provided in the Ordinance with powers to issue fresh detention orders based on the same grounds and allegations of fact as in the previous detention order. Also, germane is that on account of the express provision in the new s. 6A(2) of the Act, a fresh report under s. 3 and s. 5 of the same Act would be unnecessary and the absence of such fresh report would not make a fresh detention order invalid.

The court may look at and compare various similar legislations as aid to construction and as a guide to determining Parliament's intention. It may be useful to bear in mind the following guidelines:

A court should exercise caution before applying a definition to be found in one Act to the same word found in a different Act; but there are circumstances where this may legitimately be done, where the two Acts are in *pari materia*. For example, a court which had to decide the meaning of the word "prison" in an Act which authorises imprisonment, finding that there was no definition of a "prison" in the Act which it had to construe, looked to the Act which provided for "the continuance, establishment and control of prisons". A court may also seek the meaning of a word "by the actual use of the word, without any definition of it, in other statutes": See *Collins & Sons v. Bankstown Municipal Council* [1958] 3 LGRA 216 at 220 (NSW LVC); citing *Marquis Camden v. Inland Revenue Commissioners* [1914] 1 KB 641 (Eng CA). It may also be useful to contrast the definition of a word in one Act with the definition of the same word in another Act: See *The Public Trustee v. The Attorney-General* [1973] Tas SR 97 at 104, per Chambers J (Tas SC FC). If the two definitions use different words it is reasonable to suppose that the meanings of the two definitions are intended to be different. For example, where one Act specifically excluded bodies corporate from the definition of "consumer" but the definition of

the same word in another Act contained no such exclusion, the court held that had Parliament wished to exclude bodies corporate from the provisions of the second Act it would have done so specifically. See *Mobitel International Pty Ltd v. Dun & Bradstreet (Aust) Pty Ltd* [1977] 17 SASR 140 at 147, per dr Bray CJ (SA SC FC).

The courts normally take the view that "no real help can be gained as to the meaning of a word in statute A by reference to the meaning attributed to the same word in statute B, C or D": See *Lake v. Bennett* [1970] 1 QB 663 at 671; [1970] 2 WLR 355 at 360, per Salmon LJ (later, Lord Salmon): see also *Ministry of Housing & Local Government v. Sharp* [1970] 2 QB 223 at 264 and 272; [1970] 2 WLR 802 at 811, per Lord Denning MR, and at 819, per Salmon LJ (both Eng CA). But this presumption is reversed in the case of cognate Acts – where statutes are in *pari materia* they are covered by an extension of the maxim that an Act must be read as a whole: See *Baulkham Hills Shire Council v. O'Donnell* [1987] 62 LGRA 7 at 15 (NSW LEC). At the very least, a related Act may be expected to provide "a guide to the evil discern, and remedy for it, intended to be given by the Parliament": See *Daly v. Sydney Stock Exchange Ltd* [1981] 2 NSWLR 179 at 196 (NSW SC); affirmed, [1986] 160 CLR 371 (HCA).

Sometimes Parliament specifically provides that two Acts are to be construed as one, in which case "*prima facie* the same words and phrases should be construed in the same sense in the two Acts": See *Crowe v. Lloyds British Testing Co Ltd* [1960] 1 QB 592 at 619; [1960] 2 WLR 227 at 245, per Willmer LJ (Eng CA); see also *Northern Ireland Trailers Ltd v. Preston Corporation* [1972] 1 WLR 203 at 208, per Lord Widgery CJ (Eng DC); *R v. Industrial Appeals Court and The Fire Fighters Board* [1959] VR 345 at 359, per Dean J (Vic SC FC).

It is not uncommon to find in an Act a provision that an earlier Act is incorporated and shall be read as one with the later Act. The effect of such a provision is to transpose the earlier into the later Act or to write every provision of the earlier Act into the later Act as if they had been actually printed into it. It is a rule of construction of statutes; but it cannot be used in effect to amend the provisions of the earlier Act which is to be read as one with the later Act. Sometimes an Act provides that it is incorporated and shall be read as one with an earlier Act. The effect is the same, namely, to transpose the later into the earlier Act: See *Amalgamated Television Services Pty Ltd v. Australian Broadcasting Tribunal* [1984] 1 FCR 409 at 413; 54 ALR 57 at 62 (FCA).

It is sufficient that an Act provides that powers set out in another Act are to be applied for its purposes – the two Acts may then be treated as in *pari materia*, and a definition found in one Act can be used when interpreting the other: See *R v. Wheatley* [1979] 1 WLR 144 at 147; [1979] 1 All ER 954 at 957, per cur (Eng CA). Even a recital of the existence of other documents may be enough – it has been held to be wrong to disregard such assistance in construction as may be given by reference to those other documents: See *Benin v. Whimster* [1976] QB 297 at 314; [1975] 3 WLR 542 at 555, per Roskill LJ (later, Lord Roskill) (Eng CA): see also *Dunsmore v. Tiley* [1978] 18 SASR 259 at 266, per Dr Bray CJ (SA SC FC). The Full Court of the Victorian Supreme Court compared two Acts, one passed "to make further provision with regard to the valuation of land by municipalities, to amend the Local Government Act 1958 and for other purposes" and the other passed "to amend … the Local Government Act 1958 with respect to Land Valuations and for other purposes". In view of the obvious similarity of the purposes underlying the two Acts, the court held that "in so far as they relate to and regulate valuations by municipalities, (the Acts) should be regarded as a whole for the purposes of construction": See *Castlemaine City Council v. Scott (No 2)* [1973] VR 277 at 289-290, per Gillard J; 48 LGRA 339 (Vic SC FC). However, there are limits to the willingness of a court to treat cognate statutes as achieving the same result: while it is proper to give words the same meaning in cognate Acts (See *Re John Sanderson & Co (NSW) Pty Ltd (in liquidation) (No 2)* [1976] VR 225 at 228; 7n ALR 390 at 393 (Vic SC)), when two or several statutes cover the same subject matter, (*R v. Caldwell & Kinross ex p Makin* [1986] 2 Qd R 397 at 399, per Connolly J (Qld SC FC): see also *Lee-Verhulst (Investments) Ltd v. Harwood Trust* [1973] 1 QB 204 at 218, per Stamp LJ (Eng CA); *Huakina Development Trust v. Waikato Valley Authority and Bowater* [1986] 12 NZTPA 129 at 143 (NZ HC)), in the absence of a contrary controlling context, the principle does not justify taking a right of appeal found in one of those statutes and extending it to the other: "The fact that the two Acts have to be construed as one merely means that the language has to be given the same meaning that it would have had if they had been contained in one statute instead of two" (See *R v. Lewes Crown Court ex p Rogers* [1974] 1 WLR 196 at 199, per Lord Widgery CJ (Eng DC)).

It is not necessary that the two Acts be expressed to be read as one (*R v. Caldwell & Kinross ex p Makin* [1986] 2 Qd R 397 at 399, per Connolly J (Qld SC FC)) or for the one Act to be expressly incorporated in the other; (*R v. Wheeldon (No 1)* [1978] 33 FLR 402 at 405, per cur (FCA FC)) nor is it necessary for the one Act to amend the other, *R v. Wheeldon (supra)*. Where several statutes address the same general subject matter:

"words common to them, especially words of primacy, generally should be construed similarly, not disparately, provided that meaning is one which the words may reasonably bear according to their context in each statute. This is especially so where the word in question is fundamental both to the rights of the person with which the statutes are concerned and to the powers of court or tribunals conferred by the statutes in respect thereof" (See *Riordan v. Parole Board of the ACT* [1981] 34 ALR 322 at 329, sub nom *Riordan v. Connor* [1981] 53 FLR 112 120 (FCA)).

Where one Act amended at the same time two other Acts upon the same subject matter, it was held that in respect of that subject matter the two Acts were in *pari materia* so that the operation and effect of the amendments to both statutes were relevant in finding Parliament's intention in respect of that subject matter (See *Commissioner for Railways (NSW) v. Wynyard Holdings Ltd* [1971] 2 NSWLR 70 at 84, per Asprey JA (NSW CA); reversed in part, but the Privy Council considered the two Acts together: [1973] 2 WLR 1021 at 1027-1028; 47 ALJR 103 at 106; 26 LGRA 1 at 6).

The principle of reading cognate statutes together is one to be applied with some caution. "The use of statutes in *pari materia* as an aid to construction is permissible only in the case of ambiguity" (See *Gibson v. Manukau City Council* [1969] NZLR 474 at 485, per North P and Woodhouse J (NZ CA)) (See also *Statutory Interpretation* by Donald Gifford (edn 1990)).

Statutes in *pari materia* means statutes dealing with same subject-matter or forming part of the same system. Viscount Simonds in the case of *A.G. v. HRH Prince Ernest Augustus of Hanover* [1975] 1 All ER 49 (HL) 53, conceived it to be a right and duty to construe every word of a statute in its context and he used the word context in its wider sense including "other statutes in *pari materia*". As stated by Lord Mansfield, in *R v. Loxdale* [1758] 97 ER 394, "Where there are different statutes in *pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system and as explanatory of each other". (See further, *J.K. Steel Ltd. v. Union of India*, AIR [1970] SC 1173, p. 1183 para. 29). In a case, the Court of Appeal, while holding that smuggled gold coins constituted 'goods' within the meaning of Customs & Excise Act 1952, referred to a whole series of Customs Acts starting in 1833, going on to 1876, 1893, 1932 and 1939 and observed that reading through them it was plain that in the Customs Acts 'goods' does include gold and silver coins and bullion for when they are to be excluded they are excluded expressly by the words of the Acts. (See *Allgemeine Gold-Und Silberscheideanstalt v. Customs 7 Excise Commissioner* [1980] 2 All ER 138 (CA) 141.)

The meaning of the phrase *'pari materia'* has been explained in an American case in the following words: "Statutes are in *pari materia* which relate to the same person or thing, or to the same class of persons or things. The word par must not be confounded with the word simlis. It is used in opposition to it – intimating not likeness merely but identity. It is a phrase applicable to public statutes or general laws made at different times and in reference to the same subject." (See *United Society v. Eagle Bank* [1829] 7 Connecticut 457, p. 470, as cited in *Craies Statute Law*, p. 134 (7th edn). See further, *Shah & Co, Bombay v. State of Maharashtra* AIR [1967] SC 1877, pp. 1883, 1884; *The Sirsilk Ltd. v. The Textiles Committee* AIR [1989] SC 317, p. 330). When the two pieces of legislation are of differing scopes, it cannot be said that they are in *pari materia*. (See *State of Punjab v. Okara Grain Buyers Syndicate Ltd., Okara* AIR [1964] SC 669, pp 684, 685.) (See also *Principles of Statutory Interpretation* by Guru Prasanna Singh, 6th edn 1996.)

In the present case, notwithstanding that the Ordinance and the Act are cognate legislations, in the sense that both are designed for the purpose of incarceration of a subject without trial, and s. 7B of the Ordinance and s. 11B of the Act are in *pari materia,* it would militate against the canons of statutory construction to transpose to and read into the Ordinance the new s. 6A(2) of the Act, as the Act and the Ordinance are of differing scopes, dissimilar in purpose, and in reference in different subject.

In the light of the principles of statutory interpretation abovedumbrated, it is certainly warranted to bring into play and juxtapose s. 6A(2) of the Act with s. 7B(2) of the Ordinance, and thereby to hold (which I do) that, in the current case, if it was Parliament's intention to allow a new detention order based on old grounds and allegations of fact, it would have made amendments similar to s. 6A(2) of the Act. In any event, even if this construction is untenable, it is altogether crucially necessary, in cases of detention without trial, that the relevant provision in the Ordinance should expressly state that "no fresh detention order .. shall be invalid or inoperative by reason .. that detention order .. was made on the same grounds as the previous detention order" (precisely as expressed in the said s. 6A(2)). To hold otherwise would be to jettison overboard the vital principle enunciated in *Poh Chin Kay (supra).* In that case, each of the appellants had earlier been detained pursuant to an order under s. 6(1) of the Act or detained pursuant to an extension order under s. 11(1) of the Act. The detention order or extension order was revoked by the deputy Minister of Home Affairs under s. 11B(1) of the Act who then issued a fresh order of detention purporting to act in each case under s. 11B(2) of the Act. The appellants had applied for *habeas corpus*. These were refused

and the appellants appealed. On appeal it was argued that the minister has in law no power to issue a fresh detention order under s. 11B(2) read with s. 6(1) of the Act. And, it was held that there was no power for the minister to make a fresh order under sub-s. (1) of s. 6 of the Act relying solely on the saving provision of s. 11B of the Act. If the minister proposes to make an order under sub-s. (1) of s. 6, then he must abide by the provisions of s. 6(1)(a) and (b) of the Act all over again and not merely invoke the saving provision of s. 11B. **This is because s. 11B(1) does not speak of any fresh order and s. 11B(2) does not provide for any procedure or limit of a fresh order.** Similarly, in the case at hand s. 7B(2) of the Ordinance does not speak of a fresh detention order "made on the same grounds as the previous detention order" – that is, based on old grounds and allegations of fact. (See s. 6A(2)) of the Act.) (See also *Goh Ah Ba v. Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1991] 2 CLJ 877.) Indeed, it was in that celebrated case that Hashim Yeop Sani ACJ had occasion to state with his usual clarity – with intellectual honesty displayed to full measure – as follows:

> We are fully conscious of the government's effort to combat the drug menace in this country. But there is a fundamental principle involved here. The power to detain a person without trial cannot be exercised by inference. The power must be expressed, clear and unequivocal. Here, detention law and the liberty of the individuals are concerned, this is the most correct approach for the courts to apply. There is hardly any need to repeat what has been said on the principle to be followed by the courts in dealing with detention law. The principle was emphasised in *Re Tan Boon Liat @ Allen & Anor* at p. 114 reiterated by this court in *PP v. Koh Yoke Koon* and *Tan Hoon Seng v. Minister of Home Affairs*.

It is trite that, quite unlike other cases, in *habeas corpus* cases involving incarceration without trial, the crucial question to determine is not what – by implication or inference – Parliament had in mind but what Parliament had expressed in clear and unequivocal language. But the pith and kernel of the problem in the respondent's position is that even if it could be implied that that was what the legislature had intended, unless such intention is expressed lucidly and unequivocally, the issue must be resolved in the detenue's favour.

Without the fresh grounds and allegations of fact, the fresh detention order is unsustainable, precisely due to the statutory stipulation that the Minister must be "satisfied". This being so, the principle established in *Poh Chin Kay* and a host of kindred authorities could not be hurdled by the respondents. And, on this ground alone I would allow the writ prayed by the applicant.

Issue (b) is also intricately connected and enmeshed with issue (a) discussed above. As the question posed by counsel on his second contention was not quite correctly focused, it calls for some intricate thought process. That question could be divided into two limbs, namely: whether the detaining authorities had acted *mala fide* as they had no reason or grounds to justify the detention of the applicant under s. 4(1) of the Ordinance (first limb); and, whether in the peculiar circumstances of the case, the detaining authorities were at all in the position to believe or to form any opinion that there were grounds which would justify the applicant's detention under the said provision (second limb). And, if this could be answered in the negative, whether it would constitute a spurious, synthetic and colourable exercise of and fraud on power proscribed by the Ordinance as malice in law.

The issue posed in the first limb is wholly irrelevant (truly so), as I have held in *Lee Gee Lam and Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia and Anor* ([1993] 4 CLJ 155; [1993] 3 MLJ 265) that as the result of the ouster provision in s. 7C(1) of the Ordinance, the courts are precluded from inquiring into or questioning or reviewing the subjective satisfaction of the detaining authorities. And, it follows that a detention tainted with ill-will or malice in fact or even grounded upon a mistaken belief is not justiciable. However, it is the second limb of the issue posed to this court that is justiciable and now calls for determination. Mr Shanmugam for the applicants had argued that the manner and the procedure employed by the detaining authorities in their implementation of the fresh Detention Order had displayed malice in law though not malice in fact. Two species of malice or *mala fides*, being malice in fact and malice in law, have been established in a welter of Indian cases.

Malice in fact *(maltus aminus)* indicates the presence of actual spite or ill-will moral turpitude or evil mind or bad faith or improper or wrongful motive or a feeling of enmity which is an element that can be established by inference from circumstances and cannot normally be proved by direct evidence. See *Shearer v. Shields* [1914] AC 808 at p. 813; *S.R. Venkataraman v. Union of India* [1979] 2 SCC 491 at p. 494; *Gaylord Restaurant v. M. Chambarai* AIR Mad 108 (110, 112); and *Ramesh Chandra v. Jagannath* AIR [1975] Orissa 121 (122). It may be implied from a deliberate intention to do a wrong without justification, and a malicious act is not one which is done accidentally, thoughtlessly or negligently but designed wilfuly or wantonly (see *Bhupinder Singh v. State of Haryana* AIR [1968] Punj 406).

The phrase 'malice in law' denotes absence of legal excuse (*N.C. Jute Mills v. Finance Ministry* [1965] AIR 1966 Cal 151 (159)). If there is any question of *mala fides* in law, dishonesty or corrupt purpose, it can be challenged in court and set aside, but even if it is based on good faith, the authority has to act in accordance with and within the limits of the legislative powers. And its order can be challenged if it is beyond those limits or if it is based on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these circumstances, it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind. (See *New Central Jute Mills v. Union of India*, 73 Cal WN 557; [1969] 2 Com LJ 32: 40 Com Cas 102: AIR [1970] Cal 183 (189)). Malice in law, sometimes called colourable exercise or fraud on power, is the attainment of ends beyond the sanctioned purposes of power by simulation or pretention of gaining a legitimate goal. In *New Central Jute Mills v. Union of India (supra)*, on the point of malice in law, it was held that if the authority did not honestly form its opinion or that in forming it, it did not apply its mind it amounts to malice in law; see pp. 727 and 728 *KJ Aiyar's Judicial Dictionary* (1992 edn.) (See also *Law of Writs* by A.S. Chandhury and R.G. Chahurpedia (1985 edn.)).

In the current case I find no malice in fact, that is, malice or *mala fide* of the first kind. At any rate, I can hardly be unmindful that, constrained by s. 7C(1) of the Ordinance, it is not in our courts' province to make such finding. But, the question posed to this court for its careful deliberation, by all the applicants here was, whether there existed any malice or *mala fides* in law – that is malice of the second type. The court's task was made easier when Encik Abazafree graciously conceded that the authorities would still have to comply with s. 3(3)(c) and s. 5 of the Ordinance upon the making of a fresh Detention Order. He, however, contended that there was such compliance with the two statutory provisions by virtue of:

(a) an affidavit (encl. 17) sworn by DSP Mohd. Arif bin Abdul Latif wherein he had exhibited his 'Laporan Hal Keadaan Penangkapan dan Penahanan' which stated that: "**Penama** (Wong Chee Kong) **telah ditangkap dan ditahan** di bawah s. 3(1) Ordinan No. 5/69 pada 11 November 1998 jam 2205 hrs **di luar perkarangan hadapan pintu masuk ke Pusat Pemulihan Akhlak, Simpang Rengam, Johor untuk siasatan tentang kegiatan jenayahnya di bawah Ordinan No. 6/69.** Penahanannya di bawah s. 3(3)(a) dan 3(3)(b) Ordinan No. 6/69 ini

telah dibenarkan **supaya siasatan seterusnya dapat dilakukan**. Tarikh lanjutan terakhir di bawah s. 3(3)(b) adalah 10 Disember 1998." (emphasis added); and,

(b) another affidavit (encl. 20) by DCP Datuk Maizan bin Shaari, incorporated a noteworthy deposition (*vide* para. 1.5) which states: "Pada 8 Disember 1998, jam 1100 hrs, saya telah menerima Laporan Hal Keadaan Penangkapan dan Penahanan terhadap Wong Chee Kong KP: A 0322511 (selepas ini dikenali sebagai "pemohon") daripada Deputi Superintendan Polis Mohd. Ariff bin Abd. Latif. **Setelah mengkaji dan meneliti laporan tersebut saya mendapati bahawa** penahanan terhadap "pemohon" perlu dilanjutkan selama 30 hari bertujuan untuk meneruskan siasatan terhadap "pemohon". **Saya berpuas hati bahawa ada alasan-alasan yang mematutkan "pemohon" ditahan** di bawah s. 4(1) "Ordinan tersebut"." and "Pada 8 Disember 1998, jam 1155 hrs, saya **telah melaporkan hal keadaan penangkapan dan penahanan itu kepada Menteri Dalam Negeri Malaysia.**" (emphasis added).

It is obvious that due to the very brief period time between the release and re-arrest of the detenue at the entrance gate of the detention centre, the arresting officer was clearly not at all in the position to believe that the detenue had acted in a manner which would justify his detention. Nothing sinister involving the detenue, other than the wholly innocuous events of release and re-arrest could have happened. Hence, the only allegation of fact reportable to the Minister was the applicant's release from the detention premises and his re-arrest at the entrance gate of the detention premises a short distance away – nothing could have happened betwixt the cup and the lips, as the saying goes.

Encik Mohd Ariff bin Abd. Latif only reported that he arrested the applicant at the front of the entrance gate to the detention centre at 2205 hours Malaysian time on 11 November 1998, when the record also showed that the applicant was released on the same date on 11 November 1998 from the detention centre (see encl. 17). Curiously, and the affidavit of Datuk Maizan bin Shaari (encl. 20) purported to state that after carefully examining the said report of Encik Mohd. Ariff he was satisfied that there were grounds to justify the applicant's detention under s. 4 of the Ordinance. I fail to see what he could have done on his way out to the entrance gate of the detention centre, which could constitute 'acting in any manner prejudicial to public order', thus necessitating his detention. Datuk Maizan had thus acted in a spurious and mechanical fashion, with absolutely no application of mind, in his report to the Minister – no mind

at all. His affidavit (encl. 20) appears to be a mere stereotype document submitted to the Minister, much akin to the affidavit adduced in the case of *Liew Kim Swee v. Menteri Dalam Negeri, Malaysia & Anor* [1991] 1 CLJ 53, which was held to be a mere stereotype document by Dato' Mohtar bin Abdullah J (as he then was). This is how it was put "Afidavit-afidavit yang stereotaip dan ringkas mungkin tidak lagi memadai untuk membantu mahkamah membuat keputusan yang wajar." (See also *Cham Yoon Liang v. Menteri Dalam Negeri, Malaysia & Anor* [1989] 2 CLJ 993).

As such, I have no alternative but to hold that there was malice in law as there were spurious, synthetic and robotic procedures employed in the issuance of the subsequent detention order which constituted a colourable exercise of and fraud on power, proscribed by the Ordinance. Indeed, as the fresh detention order in the current case was for the duration of two years from the date thereof, in sharp contrast to a case under *MISC of India (supra)*, the unfortunate practical effect of the release from detention under the old detention order (made sometime considerable period earlier), and re-detention under the fresh detention order, is that the detenue was penalised – truly penalised, in terms of the period of detention that he had then already served – by such exercise of power.

In the light of the above discussion, I have no hesitation in holding here that, on my determination on both issues (a) and (b) above, jointly and severally the power under the Ordinance has been exercised neither in accordance with nor within the scope of the Ordinance. With much regret, I would therefore allow the writ petition and order that the petitioner be released forthwith. Obviously, it is the principle involved but not the subject that is paramount.

The other six kindred applications of the same nature must in the event abide by the determination in this matter. And, therefore writs of *habeas corpus* are also to be issued and the applicants released forthwith in respect of 44-02-99, 44-03-99, 44-04-99, 44-06-99, 44-07-99 and 44-08-99.

It is incontrovertible, that the powers of detention and incarceration of a citizen without trial is repugnant to his constitutional right. One is often reminded of the views expressed in the inspiring words of Justice P.N. Bhagwati in the celebrated case of *Icchu Devi v. Union of India* (AIR, Supreme Court [1980] p. 1983) where he intoned: "But at the same time we cannot forget that the power of preventive detention is a draconian power justified only in the interest of public security and order and it is tolerated in a free society only as a necessary evil. The power to detain without trial is an extraordinary power constituting encroachment on personal liberty and it is the solemn duty of the courts to ensure that this

power is exercised strictly in accordance with the requirements of the constitution and the law. The courts should always lean in favour of upholding personal liberty, for it is one of the most cherished values of mankind. Without it life would not be worth living. It is one of the pillars of free democratic society. Men have rightly laid down their lives at its altar in order to secure it, protect it and preserve it. The constitution has therefore, while conceding the power of preventive detention, provided procedural safeguards with a view to protecting the citizen against arbitrary and unjustified invasion of personal liberty and the courts have always zealously tried to uphold and enforce these safeguards. This court has also through its judicial pronouncements created various legal bulworks and breakwaters into the vast powers conferred on the executive by the laws of preventive detention prevalent at different points of time. It is true that sometimes even a smuggler may be able to secure his release from detention if one of the safeguards or requirements laid down by the constitution or the law has not been observed by the detaining authority but that can be no reason for whittling down or diluting the safeguards provided by the constitution and the law. If the detaining authority wants to preventively detain a smuggler, it can certainly do so, but only in accordance with the provisions of the constitution and the law and if there is a breach of any such provision, the rule of law requires that the detenue must be set at liberty, however wicked or mischievous he may be. The law cannot be subverted, particularly in the area of personal liberty, in order to prevent a smuggler from securing his release from detention, because whatever is the law laid down by the courts in the case of a smuggler would be equally applicable in the case of preventive detention under any other law. This court would be laying down a dangerous precedent if it allows a hard case to make bad law. We must, therefore, interpret the provisions of the constitution and the law in regard to preventive detention without being in any manner trammeled by the fact that this is a case where a possible smuggler is seeking his release from detention."

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